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Supreme Court, U.S.
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No. 98-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

INTERNATIONAL TELECARD ASSOCIATION,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## PETITION FOR WRIT OF CERTIORARI

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April 26, 1999

10pp

## QUESTION PRESENTED

1. Whether the Court of Appeals erroneously dismissed a petition for review of federal agency action on grounds of exhaustion of administrative remedies after the "filing," but not disposition, of an intermediate agency appeal under Section 5(c)(7) of the Communications Act of 1934.

## LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

The International Telecard Association ("ITA") is the largest trade association of prepaid phone card providers in the world. ITA was founded in March 1995. ITA represents its members before federal agencies and courts for the advancement of telecommunications law and policy that will bring the competitive services of prepaid phone cards to every consumer. ITA has no parent companies, subsidiaries or affiliates.

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No. 98-

IN THE

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INTERNATIONAL TELECARD ASSOCIATION,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

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---

On Petitions for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

---

## PETITION FOR WRIT OF CERTIORARI

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The International Telecard Association ("ITA") submits this petition for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The initial order of the District of Columbia Circuit dismissing this case without opinion issued September 15, 1998. Reprinted at Pet. App. 1a. The Court of Appeals denied ITA's petition for rehearing on February 23, 1999, reported at 163 F.3d 387 (D.C. Cir. 1999). Reprinted at Pet. App. 58a-61a.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

## STATUTORY PROVISIONS INVOLVED

The most relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at Pet. App. 62a-67a.

## STATEMENT OF THE CASE

This is an important case of first impression involving federal procedural requirements of Section 5(c)(7) of the Communications Act of 1934, 47 U.S.C. § 155(c)(7) (1997) ("the Act"). It raises core issues of separation of powers between the legislative and judicial branches of the federal government and will have far-reaching consequences for judicial review of federal agency decisions. The court of appeals' judgment represents such a serious departure from the settled judicial role in administrative exhaustion that certiorari is at least warranted as an exercise of this Court's supervisory powers.

Section 5 of the Communications Act permits the Federal Communications Commission ("FCC" or "Commission") to issue certain decisions on so-called "delegated authority." It provides that "[w]hen necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or order, delegate any of its functions . . . ." 47 U.S.C. § 155(c)(1) (reprinted at Pet. App. 63a). Decisions issued on delegated authority by a staff division of an agency, such as the Common Carrier Bureau, "shall have the same force and effect . . . as orders, decisions, reports or other actions of the

Commission." 47 U.S.C. § 155(c)(3) (reprinted at Pet. App. 64a). This case arises from such an order.

The FCC is charged with deregulation of public payphones under Congress's mandate in Section 276 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). Pursuant to the Section 276 requirement that payphone service providers ("PSPs") receive fair compensation for all calls made from payphones, the FCC in 1996 promulgated rules governing payphone compensation. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* Report and Order, 11 FCC Rcd. 20,541, 61 Fed. Reg. 52,307 (1996) (excerpts reprinted at Pet. App. 3a-26a). Among the calls that were particularly at issue were 1-800 access code calls, such as "1-800-CALL-ATT," and debit (or prepaid) card calls, which enable payphone users to make long distance calls without depositing coins. In order to ensure that PSPs receive compensation for these calls, the FCC implemented a payphone call tracking plan by which payphones must transmit "coding digits" that enable long distance carriers to verify all payphone calls. The FCC ordered all PSPs to transmit coding digits by October 7, 1997. Pet. App. 19a-20a.

Nonetheless, on October 7, 1997, the Common Carrier Bureau ("Bureau") granted, without notice, a waiver to PSPs that extended the coding digits compliance deadline to March 9, 1998. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd. 16,387, 62 Fed. Reg. 60,034 (1997) (excerpts printed at Pet.

App. 27a-35a). ITA sought timely reconsideration of this Order on November 6, 1997, on the ground that prepaid card providers cannot track payphone calls on a real-time basis without payphone coding digits.

The Bureau denied ITA's petition on March 9, 1998, holding that PSPs' failure to provide payphone coding digits should not relieve prepaid card providers of their obligation to compensate PSPs. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd. 4998, 63 Fed. Reg. 20,534 (1998) ("*Bureau Order*") (excerpts reprinted at Pet. App. 36a-57a). ITA then filed an application for review with the full Commission on April 8, 1998, requesting review of the *Bureau Order* pursuant to Section 5 of the Communications Act, 47 U.S.C. § 155(c)(7).

The FCC neither asked for comment on, nor decided the merits of, ITA's application for review of the *Bureau Order*. Accordingly, on June 28, 1998, ITA filed a timely petition for review with the United States Court of Appeals for the District of Columbia Circuit. The court of appeals dismissed ITA's Petition for Review in an unpublished order on September 15, 1998, holding that ITA had not exhausted its administrative remedies. Pet. App. 71a-78a. ITA then sought rehearing by the court of appeals, arguing that Section 5(c)(7) expressly requires only the "filing" of an application for review and that the question of first impression in this case was too important to be decided without a published opinion. Pet. App. 67a-74a In a published opinion on February 23, 1998, the court of appeals denied rehearing, concluding that Section 5(c)(7) requires

not just the filing of an intermediate administrative appeal, but also its disposition by the agency, as a jurisdictional predicate to appellate review. *International Telecard Ass'n v. FCC*, 163 F.3d 387 (D.C. Cir. 1998) (reprinted at Pet. App. 58a-61a). To date, the FCC has not decided ITA's April 8, 1998 application for review.

## SUMMARY OF ARGUMENT

This case presents an issue of first impression regarding a key procedural provision of the Communications Act. Review by the Court is appropriate because the court of appeals' decision contradicts settled law on the separation of legislative from judicial powers in prescribing federal appellate jurisdiction and, if left uncorrected, will permit the FCC and other agencies to thwart judicial review of administrative decisions by simple inaction.

Congress, not the judiciary, is responsible for establishing federal appellate jurisdiction. The court of appeals has blurred this line by adding appellate procedural requirements to a provision of the Communications Act that is already abundantly clear. Because Congress required in Section 5(c)(7) of the Act only the "filing" of an application for review, the courts may not abrogate, alter or embellish this congressional mandate. By substituting its policy judgment for a congressional statute, the court of appeals has overstepped its proper role in our governmental system.

Moreover, the D.C. Circuit has done so by relying on a case that it patently inapposite to this matter, one in which no intermediate agency appeal had been filed. The Act does not

require the FCC to decide these Section 5(c)(7) appeals and sets no timeframe for agency decision. Accordingly, in dismissing ITA's petition for review, the D.C. Circuit has effectively established a policy that permits, and even encourages, federal agencies to subvert federal judicial review merely by failing to act. ITA therefore requests this Court to hear this case in order to correct this departure from settled exhaustion doctrine and separation of powers precepts.

## REASONS FOR ISSUING THE WRIT

### I. THE COURT OF APPEALS' JUDGMENT CONFLICTS WITH SETTLED DOCTRINE ON THE ROLE OF THE JUDICIARY IN ADMINISTRATIVE EXHAUSTION AND UNDERMINES THE SUPREMACY OF CONGRESS AS THE DELIMITER OF FEDERAL COURT JURISDICTION.

Separation of powers doctrine dictates that when Congress enacts legislation to govern exhaustion of administrative remedies, the federal courts are to implement congressional intent. Contrary to this settled principle, the court of appeals ignored the plain language of the Communications Act in holding that Section 5(c)(7) requires that FCC to decide applications for full agency review as a condition precedent to appeal. This unilateral imposition of judicially created administrative exhaustion requirements cannot be squared with the Act, well-established law of

exhaustion, or the few prior cases interpreting this provision of the Communications Act.

A. The Express Language of Section 5 Requires Only the "Filing" of an Intermediate Agency Appeal.

Section 5(c)(7) of the Communications Act, 47 U.S.C. § 155(c)(7), requires parties to request full Commission review of an order prior to seeking judicial review. That provision states that "[t]he *filing of an application for review* under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation [of authority] under paragraph (1) [of this section]." 47 U.S.C. § 155(c)(7) (emphasis added). There is no question in this case that ITA complied with Section 5(c)(7) by filing an application for review of the *Bureau Order*. The only issue is whether the court of appeals was empowered to add the requirement, which appears nowhere in the Act, that the full agency actually decide these intermediate agency appeals prior to appellate review.

Settled doctrine delineating separation of powers requires that "the initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Patsy v. Bd. of Regents of the State of Florida*, 457 U.S. 496, 501 (1982). In examining exhaustion requirements, federal courts must consider "legislative purpose, which is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic

procedural scheme under which claims may be heard in federal courts." *Id.* at 501-502.

Moreover, this Court has consistently held that Congress is presumed to mean what it says when drafting a statute. For example, the Court held in *Moskal v. United States*, 498 U.S. 103, 108 (1990), that "'[i]n determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning'" (citation omitted). The judicial role is "to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (1982) (citation omitted).[1]

This Court's landmark decision in *Chevron U.S.A. v. Natural Resources Defense Council* provides a clear formula for reviewing agency statutes:

> First, always, is the question whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. 837, 842-43 (1984). Here, the requirements of the Act are patently "unambiguous" and were obeyed by ITA

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[1] The Court has permitted consideration of a statute's "purpose" to determine its meaning, but cautions that "[t]he 'plain purpose' of legislation, however, is determined in the first instance with reference to the plain language of the statute itself." *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986).

completely. Section 5(c)(7) requires the "filing" of an application for full Commission review. It does not, but could have, required the agency to decide such an application as a "condition precedent to judicial review." 47 U.S.C. §155(c)(7). As this Court has emphasized, when the language and purpose of Congress is clear, "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (citation omitted). Indeed, the D.C. Circuit has dismissed appeals where parties had done less, stating that "remedies available to appellant are spelled out in the statutes and the rules, and there is no excuse for its failure to pursue them." *Red River Broadcasting Co. v. FCC*, 98 F.2d 282 (D.C. Cir. 1938). *See also Committee to Save WEAM v. FCC*, 808 F.2d 113, 115-16 (D.C. Cir. 1986). But this is not such a case. To the contrary, here the court of appeals fashioned out of whole cloth a new exhaustion requirement that is grounded neither in the language nor the purpose of the statute.

The purpose of Section 5(c)(7), like the accepted policy underlying the exhaustion requirement, contradicts the court of appeals' judgment. It is proper that an agency retain jurisdiction over its own matters until its expertise has been exhausted, thereby requiring aggrieved parties to defer to the agency prior to seeking relief from the judiciary. *McCarthy*, 503 U.S. at 145.The legislative history of Section 5 instructs that Congress "imposed the requirement in order to ensure that the full Commission had 'an opportunity to review the decision before the matter goes to the courts.'" S. Rep. No. 576, 87th Cong., 1st Sess. at 2 (1961). It is the filing of an application for review that gives the full FCC the

"opportunity to review" delegated staff decisions. Because the Act does not mandate that the agency actually decide such applications, discretion to exercise this opportunity rests with the agency.

B. Federal Courts Are Not Empowered to Set Administrative Exhaustion Requirements Exceeding the Express Conditions Specified by Congress.

Settled law on exhaustion of administrative remedies requires courts to heed the exhaustion strictures Congress has mandated. "Where Congress specifically mandates, exhaustion is required." *McCarthy*, 503 U.S. at 144. Courts may not impose additional exhaustion requirements as a prerequisite to judicial review. *Darby v. Cisneros*, 113 S. Ct. 2539, 2544 (1993). Moreover, if courts perceive a statutory oversight or anomaly, no matter how obvious, "the remedy lies with the law making authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

Congress drafted Section 5 to require specifically the *filing* of an application for review prior to judicial review, without any requirement to wait for that application's disposition.[2] By interpreting this provision to require something more, the court of appeals has interposed its own judgment on proper allocation of federal court jurisdiction

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[2] Section 5 states that "[t]he time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case." 47 U.S.C. § 5(c)(7). This language, however, goes only to *timeliness* of appeals and not their *ripeness*. The ripeness requirement is clearly prescribed in the "filing" clause of Section 5(c)(7).

for those established by Congress. Yet the appropriate role of courts — in both statutory interpretation and administrative exhaustion — is to apply congressional intent, not to set policy.

The court of appeals' decision below is thus either a careless disregard of Congress's expressed intent or a *sub silentio* effort to limit the administrative law dockets of the federal courts. Even if they were based on valid policy, each of these explanations raises grave separation of powers implications, for each represents improper judicial intrusion into the law-making province of Congress.

C. The Court of Appeals Erred in Relying on *Richman Bros.* to Dismiss Petitioner's Petition.

In dismissing ITA's petition for review, the D.C. Circuit relied on its earlier decision in *Richman Bros.*, in which it dismissed an appeal of a Common Carrier Bureau order issued in a primary jurisdiction case. *Richman Bros. Records v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997). The court's reliance on this case was misplaced, as the holding of *Richman Bros.* illustrates precisely why appellate review was proper here.

In *Richman Bros.*, petitioner sought review of a Bureau order holding that a limitation of liability provision contained in a federal tariff of a long-distance telephone carrier constitutes an affirmative defense to a state damages claim. Petitioner sought judicial review of the Bureau's decision *without seeking review by the FCC* as Section 5 requires. The D.C. Circuit dismissed the case for failure to exhaust administrative remedies under Section 5.

This case, in which ITA filed a timely application for review, is the counter image of *Richman Bros.* Nonetheless, the court of appeals inexplicably held on rehearing that "ITA's reading of § 155(c)(7) . . . conflicts with the reasoning of *Richman Bros.* . . . We disallowed Richman's attempt to obtain judicial review of the resulting staff decision *without first seeking Commission review*." 166 F.3d at 388 (emphasis added).[3]

Although it issued a rehearing opinion, the court of appeals' reasoning is no more satisfactory than its prior unpublished order. In view of the serious consequences for federal administrative procedure, as discussed in the next section, this plain error warrants certiorari review by this Court as an exercise of its supervisory powers.

## II. THE COURT OF APPEALS' DECISION ENABLES FEDERAL ADMINISTRATIVE AGENCIES TO OBSTRUCT JUDICIAL REVIEW THROUGH SIMPLE INACTION.

A black-letter rule of statutory construction "enjoins courts not to attribute to the Legislature a construction which leads to absurd results." *Red River Broadcasting*, 98 F.2d at 287 (quoting *United States ex rel. Anderson v. Anderson*, 76 F.2d 375, 378 (8th Cir. 1935)). The result of the D.C.

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[3] There are two other cases interpreting Section 5(c)(7) that the D.C. Circuit did not cite. These cases rest on facts similar to *Richman Bros.* in that no intermediate agency appeal was made prior to seeking judicial review. *B. B. McClendon, Jr. v. Jackson Television and FCC*, 603 F.2d 1174 (5th Cir. 1979)(dismissing an appeal from FCC denial of television license); *Campos v. FCC*, 487 F. Supp. 865 (N.D. Ill. 1980)(dismissing an appeal from FCC decision that aliens are ineligible for broadcast licenses).

Circuit's dismissal of this case is patently absurd: it announces that the FCC may prevent parties from obtaining relief in the judiciary simply by refusing to act. This message threatens the integrity of the administrative process by making the FCC the final arbiter of its own decisions.

Applications for full Commission review routinely languish at the agency for years without decision. For instance, the record below reveals that instead of deciding an application for agency review of the Common Carrier Bureau's pre-1996 Act payphone rules, the FCC waited two years, until its new payphone rules were promulgated under Section 276 of the 1996 Act, and then released an order dismissing the application on grounds of mootness. *Application for Review and Motion for Stay of Allnet Communications Services*, Memorandum Opinion and Order, FCC 98-161, 13 FCC Rcd. 13,760 (1998). *See* ITA Petition for Rehearing at Pet. App. 77a.

The outcome of this case will have far-reaching consequences for FCC practices at this crucial time when virtually its every decision under the 1996 Act is subject to federal appellate review.[4] Under the D.C. Circuit's decision, any agency decision issued on delegated authority is simply untouchable by federal courts. Thus, the agency will have an incentive to issue decisions in controversial cases at the Staff

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[4] As the Court has aptly described, the 1996 Act is a "not model of clarity." *Iowa Utils. Bd. v. FCC*, 119 S. Ct. 721, 738 (1999). There are scores of appeals pending under the 1996 Act. If the decision below stands, the FCC could prevent judicial review of its decisions under the Act by the simple expedient of issuing them on "delegated authority."

level in order to shield its actions from appellate oversight. Conversely, parties to FCC proceedings will be at the mercy of a discretionary agency procedure – where a decision is *not* required by statute – and will therefore be pressed to seek review by way of mandamus. And apart from the FCC, all federal agencies will now be emboldened to seek dismissal of appellate review cases where there is some administrative process, even if not mandated by Congress, that a litigant might conceivably have utilized. These serious consequences threaten to fundamentally alter the balance of power between courts and agencies in deciding administrative law cases, and deserve the attention of this Court.

## CONCLUSION

For all these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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April 26, 1999

# APPENDIX

No. 98-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

INTERNATIONAL TELECARD ASSOCIATION,

*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## PETITIONER'S APPENDIX

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United States Court of Appeals
for the District of Columbia Circuit

No. 98-1291 September Term, 1999

The International Telecard Association
and WorldCom, Inc.,
Petitioners

v.

Federal Communications Commission
and United States of America,
Respondents

---

Telecommunications Resellers Association
et al., Intervenors

BEFORE: Ginsburg, Sentelle, and Rogers, Circuit Judges

ORDER

Upon consideration of the motion to dismiss, the opposition thereto and the reply; and petitioners' alternative request for a writ of mandamus, it is

ORDERED that the motion to dismiss be granted, and the request for a writ of mandamus be denied. Because petitioners have not exhausted the administrative remedies

available within the Federal Communications Commission, judicial review is not available. See 47 U.S.C. § 5(c)(7); Richman Brothers Records v. F.C.C., 124 F.3d 1302, 1303 (D.C. Cir. 1997). Petitoners' alternative mandamus request must be denied because the agency's delay in acting on the application for administrative review filed in April 1998 is not unreasonable. See Telecommunications Research & Action Center v. F.C.C., 750 F.2d 70, 79 (D.C. Cir. 1984).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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|---|---|
| IN THE MATTER OF | ) |
| | ) |
| IMPLEMENTATION OF THE | ) |
| PAY TELEPHONE RECLASSIFICATION | ) |
| AND COMPENSATION PROVISIONS OF THE | ) |
| TELECOMMUNICATIONS ACT OF 1996 | ) |
| | |
| CC DOCKET NO. 96-128 | |
| | |
| POLICIES AND RULES CONCERNING | ) |
| OPERATOR SERVICE ACCESS AND | ) |
| PAY TELEPHONE COMPENSATION | ) |
| | |
| CC DOCKET. NO. 91-35 | |
| | |
| PETITION OF THE PUBLIC TELEPHONE | ) |
| COUNCIL TO TREAT BELL OPERATING COMPANY | ) |
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| | |
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| REQUESTING COMPENSATION FOR | ) |
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| OWNERS AND PRESUBSCRIBED OPERATOR | ) |
| SERVICES PROVIDERS | ) |

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| ASSOCIATION TO AMEND AND CLARIFY | ) |
| SECTION 68.2(A)OF THE | ) |
| COMMISSION'S RULES | ) |
| | ) |
| AMENDMENT OF SECTION 69.2(M) | ) |
| AND (EE) OF THE COMMISSION'S RULES | ) |
| TO INCLUDE INDEPENDENT PUBLIC | ) |
| PAYPHONES WITHIN THE "PUBLIC | ) |
| TELEPHONE" EXEMPTION FROM END USER | ) |
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**REPORT AND ORDER**

Adopted: September 20, 1996
Released: September 20, 1996

By the Commission: Commissioner Chong issuing a statement.

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## I. INTRODUCTION

1. On June 4, 1996, the Commission adopted a Notice of Proposed Rulemaking ("Notice") to implement Section 276 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"). In this Report and Order, the Commission adopts new rules and policies governing the payphone industry that: (1) establish a plan to ensure fair compensation for "each and every completed intrastate and interstate call using [a] payphone[;]" (2) discontinue intrastate and interstate carrier access charge payphone service elements and payments and intrastate and interstate payphone subsidies from basic exchange services; (3) prescribe nonstructural safeguards for Bell Operating Company ("BOC") payphones; (4) permit the BOCs to negotiate with payphone location providers on the interLATA carrier presubscribed to their payphones; (5) permit all payphone service providers to negotiate with location providers on the intraLATA carrier presubscribed to their payphones; and (6) adopt guidelines for use by the states in establishing public interest payphones to be located "where there would otherwise not be a payphone[.]"

2. The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. The 1996 Act erects a "pro-competitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." In this proceeding we advance the twin goals of Section 276 the

Act of "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public..." To this end, we seek to eliminate those regulatory constraints that inhibit the ability both to enter and exit the payphone marketplace, and to compete for the right to provide services to customers through payphones. At the same time, we recognize that a transition period is necessary to eliminate the effects of some long-standing barriers to full competition in the payphone market. For this reason, we will continue for a limited time to regulate certain aspects of the payphone market, but only until such time as the market evolves to erase these sources of market distortions.

3. Congress has directed us to take certain actions to effectuate its goals in the payphone area including the removal of subsidy schemes, providing for nondiscriminatory access to bottleneck facilities, ensuring fair compensation for all calls from payphones, and allowing all competitors equal opportunity to compete for essential aspects of the payphone business. In general, we believe that vigorous and unfettered competition is the best way of achieving Congress' dual objectives. Unfortunately, various barriers -- regulatory, structural, economic, and technological -- stand in the way of having a fully competitive market providing payphone services. For example, the lack of an effective per-call tracking mechanism is a technological barrier that prevents market forces from readily achieving Congress' goal of ensuring fair compensation to payphone services providers ("PSPs"). Regulatory restrictions on the placement of payphones, and existing subsidies from other

telecommunication services available to certain competitors but not others are also examples of regulatory inefficiencies affecting competition and the widespread deployment of payphones.

4. In this Report and Order, we take the critical steps necessary to remove these barriers. Some barriers are removed right away. For example, we establish an immediate plan to ensure that PSPs receive fair compensation, especially for those calls for which PSPs have not been compensated in the past. We also order that subsidies from basic telecommunications services paid to some carriers for providing payphone services be terminated as soon as it is practicable. We condition the competitive entry of these carriers into the nonregulated activity of providing payphone services on their termination of these subsidies. Similarly, we allow the BOCs to negotiate with the payphone location providers in selecting and contracting with the telecommunications carriers that provide interLATA service from their payphones, but only after they have put in place nonstructural safeguards necessary to protect against a BOC from unlawfully subsidizing its payphone operations from its local exchange services or otherwise engaging in anti-competitive behavior.

5. Removing other types of barriers to full competition will take more time. For example, the ability to track toll-free calls has not been developed fully. Until that functionality is available, as we have specified in this Report and Order, our plan for ensuring fair compensation will be a proxy that closely resembles the behavior of the marketplace

as demonstrated by the record of this proceeding. To the extent that they exist, removing entry and exit restrictions placed upon the provisioning of payphone services will also take time because it requires action by the states. During the interim period before subsidies for LEC payphones are terminated and per-call compensation becomes effective, the states should examine and remove those regulations that affect the ability of PSPs to freely enter and exit this business.

6. Although we embark in this Report and Order on a new deregulatory structure for the payphone industry, we take a number of steps to facilitate use of payphones by consumers. First, we require that each payphone clearly indicate the local coin rate within the informational placard on each payphone. Pursuant to existing requirements, this placard must provide information on the operator service provider presubscribed to the payphone and the address of the Commission, to which the consumer may direct complaints regarding operator services. Second, we require that each payphone provide access, free of charge to the caller, to emergency calling, telecommunications relay service calls for the hearing disabled, and dialtone generally.

7. In addition, payphones unquestionably serve critical public interests in health, safety and welfare. It is possible, however, that reliance on the market may fail to provide adequately for payphones in locations serving important public needs, because some payphones providing these benefits may not be economically self-supporting. For example, payphones in neighborhoods with low residential

phone penetration, or along deserted stretches of highway, can be essential for public safety but fail to be revenue-generating for various reasons, including lack of sufficient traffic, damage from extreme weather conditions, or high maintenance costs. For these reasons, we establish criteria by which the states may maintain and fund public interest payphones in locations serving health, safety, and welfare goals, where they would not otherwise exist as a result of the operation of the market. Public interest payphones will also further our policies on emergency access and telecommunications relay service calls for the hearing disabled. But while we grant the states broad discretion in administering and funding public interest payphone programs, we also require that they do so in a manner which does not upset the competitive balance of the payphone market (i.e., competitively neutral), and that fairly and equitably compensates those entities providing public interest payphones.

8. Our ultimate goal is to have a competitive payphone industry that meets the needs of the public by a wide deployment of payphones. In our view, we can best facilitate this by putting in place rules and regulations that provide incentives to all the players in the industry to eliminate, as soon as possible, all of the market distorting factors that exist today.

## II. BACKGROUND

9. As the Commission discussed in the Notice, payphone services have historically been regulated by the states and the Commission. To date, the states have regulated payphones as part of the LEC's network-based service. Some states have also imposed regulation on the operator service rates charged at payphones maintained by non-LEC, independent payphone providers. The Commission has focused on payphones primarily in the context of our regulation of carriers that provide operator-assisted long-distance service, known as operator service providers ("OSPs"), and in particular, our implementation of the Telephone Operator Consumer Services Improvement Act ("TOCSIA"). Among other things, TOCSIA directed the Commission to determine whether independent payphone providers should receive compensation for originating interstate calls to non-presubscribed OSPs from their payphones. The Commission's consideration of compensation issues under TOCSIA led to the creation of a compensation mechanism that is an antecedent to the one adopted in the instant proceeding. Currently, there are approximately 1.5 million incumbent local exchange carrier ("LEC") payphones and approximately 350,000 competitively provided payphones.

10. As stated in the Notice, Section 276(b)(1)(A) directs the Commission to establish a compensation plan to ensure "that all payphone service providers are fairly

compensated for each and every completed intrastate and interstate call" from their payphones. Section 276(b)(1)(B) mandates that the Commission "discontinue the intrastate and interstate carrier access charge payphone service elements and payments ... and all intrastate and interstate subsidies from basic exchange and exchange access revenues." In addition, Section 276(b)(1)(D) directs the Commission to consider whether BOCs should be granted certain rights already available to all other PSPs to participate in the location provider's selection of presubscribed interLATA carrier, while Section 276(b)(1)(E) grants certain rights to all PSPs to participate in the selection of presubscribed intraLATA carriers. Together with the other subsections of Section 276, these three provisions help to establish regulatory parity for all PSPs, whether independent payphone providers or incumbent LECs (both independents LECs and BOCs).

* * *

## A. COMPENSATION FOR EACH AND EVERY COMPLETED INTRASTATE AND INTERSTATE CALL ORIGINATED BY PAYPHONES

11. Section 276 requires that we establish a plan to ensure fair compensation for all calls. As discussed below, fair compensation can be ensured best when the PSP can track the calls made from the payphone on a call-by-call basis and be assured efficient payment for those calls; when the market can set a fair rate for the call; and when the caller

has the information necessary to make an informed choice as to whether to make the call and incur the compensation charge.

* * *

3. Ability of Carriers to Track Calls From Payphones

a. The Notice

88. The Commission tentatively concluded, in the Notice, that tracking mechanisms and surrogates exist, or might readily be made available, to support the per-call compensation plan mandated by Section 276(b)(1)(A). We sought comment on what tracking options are currently, or may soon be, available. Additionally, we sought further comment on the ability of existing IXC-based tracking mechanisms to accommodate all payphone providers and IXCs. In the event that no standard technology or mechanism available for tracking exists, the Commission sought comment on alternative surrogate methodologies that could be devised. Finally, we sought comment on which party or parties, whether IXCs, PSPs, or intraLATA carriers, should be required to develop and maintain the tracking or surrogate methodologies.

89. The Commission also tentatively concluded that IXCs and intraLATA carriers should be required to initiate an annual independent verification of their per-call tracking functions, to be made available for FCC inspection, to ensure that they are tracking all of the calls for which they

are obligated to pay compensation. Additionally, the Commission sought comment on whether BOCs and other LECs that provide network tracking for their own payphones should be required to make those tracking services available to independent payphone providers at the same rates, terms, and conditions as they provide themselves.

b. Comments

90. The RBOCs support the Commission's tentative conclusion that the requisite technology currently exists for carriers to track calls routed to them from payphones. The RBOCs argue further that no standardized technology for tracking calls needs to be prescribed by the Commission, and that carriers should be permitted to use whatever technology they prefer to meet their tracking obligations. They request that, if the Commission requires the carrier receiving the call to provide the call tracking, then the Commission should not preclude LECs and PSPs from developing their own call tracking capabilities. The RBOCs also contend that the Commission should establish both a timeline for achieving full call tracking capabilities within 12 months after the effective date of the rules, and interim compensation rates based on average calling rates until then.

91. The RBOCs, USTA, Sprint, One Call, California PUC, and others argue that the Commission should require that IXCs that receive the calls from payphones be obligated to provide the call tracking necessary for compensation. These parties argue that only IXCs can track calls to completion, IXCs are the primary

economic beneficiary of these calls, and that non-IXC tracking surrogates are not reliable. Ameritech argues, on the other hand, that the IXCs should not be required to track calls, except during a brief transition period.

92. Other commenters note difficulties that they argue are inherent with IXC tracking capabilities. MCI and Sprint argue that each payphone should be required to generate 07 or 27 coding digits within the automatic number identification ("ANI") for the carrier to track calls. AT&T states that it currently cannot track subscriber 800 calls because it receives only the ANI of the terminating telephone. Because it estimates that a per-call tracking ability for subscriber 800 calls will take one year to achieve, AT&T argues that the Commission should use a surrogate for these calls, which relies on "studies made from a representative weighted sample of central-office-implemented payphones." The RBOCs propose a year phase-in period for tracking subscriber 800 calls, but argue that AT&T's proposed surrogate would rely on central-office-implemented or "dumb" payphones, which are found in low usage areas and, therefore, would underestimate the volume of subscriber 800 calls. USTA also supports relying on a surrogate for subscriber 800 calls for a one year transition period. Some IXCs, such as MCI, Cable & Wireless, and CompTel, contend that carrier tracking is not practical or appropriate, and that it would involve substantial new investment. Cable & Wireless estimates that it would require a $1 million investment to establish a tracking mechanism for all of the calls that its network carries. Cable & Wireless also contends that requiring IXCs to track calls

would lead to an impossible administrative task on the part of the carriers, because the IXCs would need to search all of their call records to identify and separate out calls from payphones.

93. APCC argues that the Commission has a number of options for mediating the per-call tracking burden of the small carriers. One option, according to APCC, would be to require the LECs to track calls on behalf of small IXCs. A second option, APCC argues, would be to relieve small carriers of the tracking obligation and have them pay per-call compensation, particularly for subscriber 800 calls, on a flat rate per month according to their percentage of toll revenue or, if possible, their percentage of overall payphone and non-payphone 800 service traffic. The RBOCs contend, on the other hand, that the small carriers should be required to track individual calls using payphones or contract out the tracking to another party, because carriers that benefit from being in the market must accept the responsibilities that go with it.

94. Various commenters, particularly some IXCs and Ameritech, argue that the Commission should place the obligation to track calls using a payphone on LECs, PSPs, or a combination of both. For example, CompTel argues that LECs should provide the tracking, and the PSPs should pay the LECs for this service. MCI and Indiana URC contend that LECs and PSPs should share the responsibility for tracking calls. WorldCom argues that per-call tracking should be the responsibility of the LECs, while Ameritech and Scherers argue that the PSPs should assume this obligation. These parties contend that LEC- or PSP-based

tracking would be superior because those who want payment must keep count of compensable calls and bill for them, and all payphones will soon be able to obtain call detail information to make this possible. Ameritech argues that the Commission should require IXCs to process answer supervision for LECs engaged in tracking. The RBOCs, GTE, and NECA oppose a tracking system that would place the responsibility for tracking calls on LECs. They argue both that the Commission should not disproportionately burden the LECs while other parties receive the primary benefit for these calls, and that only IXCs can track calls to completion and detect multiple calls within a single dialing transaction. USTA contends that LECs are not able to track subscriber 800 calls.

95. The RBOCs support the Commission's tentative conclusion that carriers should be required to initiate an annual independent verification of their per-call tracking functions for a period of two years, provided that both the Commission and PSPs be allowed to inspect this verification. APCC argues that the Commission should require annual independent audits of carriers' per-call tracking functions and require the carriers to compare their data against parallel LEC or smart payphone data. Telaleasing argues that such an audit should occur on a quarterly basis.

c. Discussion

96. Based on the information in the record, we conclude that the requisite technology exists for IXCs to

track calls from payphones. We recognize, however, that tracking capabilities vary from carrier to carrier, and that it may be appropriate, for an interim period, for some carriers to pay compensation for "each and every completed intrastate and interstate call" on a flat-rate basis until per-call tracking capabilities are put into place, as discussed below.

97. We conclude further that, as stated in the Notice, it is the responsibility of the carrier, whether it provides intraLATA or interLATA services, as the primary economic beneficiary of the payphone calls, to track the calls it receives from payphones, although the carrier has the option of performing the tracking itself or contracting out these functions to another party, such as a LEC or clearinghouse. In other words, while we assign the burden of tracking on the carrier receiving the call from a payphone, parties to a contract may find it economically advantageous to place this tracking responsibility on another party. We decline to require LECs or PSPs to perform per-call tracking themselves. Neither LECs nor PSPs are the primary economic beneficiaries of payphone calls. We conclude, however, that LECs, PSPs, and the carriers receiving payphone calls should be able to take advantage of each other's technological capabilities through the contracting process. To this end, we agree with the RBOCs and conclude that no standardized technology for tracking calls is necessary, and that IXCs may use the technology of their choice to meet their tracking obligations.

98. MCI and Sprint contend that each payphone should be required to generate 07 or 27 coding digits within

the ANI for the carrier to track calls. We agree. Currently under our rules, LECs are required to tariff federally originating line screening ("OLS") services that provide a discrete code to identify payphones that are maintained by non-LEC providers. We conclude that LECs should be required to provide similar coding digits for their own payphones.

99. AT&T states that it currently cannot track subscriber 800 calls because it receives only the ANI of the terminating telephone, and it estimates that a per-call tracking ability for subscriber 800 calls will take one year to achieve. Other commenters, such as the RBOCs and USTA, propose a one-year transition before carriers are required to track subscriber 800 calls. In view of the current difficulties in tracking such calls, we conclude that a transition is warranted for requiring carriers to track compensable calls. Therefore, we require carriers to provide for tracking of all compensable calls they receive from payphones, through any arrangement they choose, as soon as possible, but no later than one year from the effective date of the rules adopted in this proceeding. Until that date, carriers must pay flat-rate compensation, as specified below.

100. We recognize that implementing a per-call tracking capability will require new investments for some carriers, particularly small carriers, but we conclude that the mandate of Section 276 that we ensure a fair "per call compensation plan" for "each and every completed intrastate and interstate call" requires these carriers to provide tracking for calls for which they receive revenue, even though they

previously did not have to compensate the PSP for many of these calls. We conclude further that, by permitting carriers to contract out their per-call tracking responsibility, and by allowing a transition for tracking subscriber 800 calls, we have taken the appropriate steps to minimize the per-call tracking burden on small carriers. In addition, we conclude that, to parallel the obligation of the facilities-based carrier to pay compensation, the underlying, facilities-based carrier has the burden of tracking calls to its reseller customers, and it may recover that cost from the reseller, if it chooses.

101. In the Notice, we tentatively concluded that carriers should be required to initiate an annual verification of their per-call tracking functions to be made available for FCC inspection upon request, to ensure that they are tracking all of the calls for which they are obligated to pay compensation. We require this verification for a one-year period, the 1998 calendar year, and delegate to the Chief, Common Carrier Bureau, the authority to establish the form and content, if necessary, of the verification documentation of these per-call tracking capabilities. We conclude that requiring carriers to maintain the appropriate records and certify as to the accuracy of both the data and the tracking methodology would facilitate the prompt and accurate payment of per-call compensation. We also conclude that PSPs should be allowed to inspect this certification, apart from any proprietary network data. In addition, we expect that the PSPs and carriers performing the tracking will work together to reconcile or explain any PSP data that are inconsistent with the annual certification. We decline to adopt, however, the suggestions of some commenters that we

require a full-scale independent audit of a carrier's tracking capability, or mandate that the verification occur on a quarterly basis. A full-scale audit or a quarterly verification would impose too great of a burden on carriers in an area where we have encouraged them to use technology and other arrangements of their choice in implementing a per-call tracking capability.

* * *

## V. CONCLUSION

363. In this Report and Order, we have established procedures that will ensure that all payphone service providers are fairly compensated for every completed intrastate, interstate and international call, except for those calls excepted by statute, and we adopt interim compensation until the new compensation procedures are effective. We have also established procedures that ensure that all subsidies from basic exchange and exchange access revenues are removed simultaneous with the LECs' receipt of compensation for calls from LEC payphones. We require the BOCs to comply with certain nonstructural safeguards for their provision of payphone service, and allow them to negotiate with location providers for selecting and contracting with the carriers that provide interLata service from their phones. We set forth herein guidelines for public interest payphones, and establish guidelines for states to use in their proceedings for funding of such payphones.

## VI. ORDERING CLAUSES

364. Accordingly, pursuant to authority contained in Sections 1, 4, 201-205, 215, 218, 219, 220, 226, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 219, 220, 226, and 276, IT IS ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED.

365. IT IS FURTHER ORDERED, that 47 C.F.R. Part 64, Subpart G and Subpart M ARE AMENDED as set forth in Appendix D, effective (30) days after publication of the text thereof in the Federal Register.

366. IT IS FURTHER ORDERED, that 47 C.F.R. Part 64, Subpart M IS AMENDED as set forth in Appendix E, effective one year after publication of the text thereof in the Federal Register.

367. IT IS FURTHER ORDERED, that 47 C.F.R. Part 68, Subpart A IS AMENDED as set forth in Appendix E, effective April 15, 1997.

368. IT IS FURTHER ORDERED, that local exchange carriers SHALL RECLASSIFY their payphone assets and related expenses to nonregulated status on April 15, 1997.

369. IT IS FURTHER ORDERED, that carriers required to file a cost allocation manual pursuant to 47 C.F.R. Section 64.903 or by Commission order SHALL

FILE revisions to their manuals implementing the reclassification required herein no later than February 14, 1997.

370. IT IS FURTHER ORDERED, that local exchange carriers SHALL FILE tariff revisions required by paras. 180 to 187 herein on January 15, 1997, to be effective April 15, 1997.

371. IT IS FURTHER ORDERED, the Bell Operating Companies ARE GRANTED waivers of the time requirements of the Computer II and the Computer III network disclosure requirements in order to provide basic network payphone services by April 15, 1997. Pursuant to this waiver, network disclosure notification for these basic network payphone services must be filed no later than January 15, 1997.

372. IT IS FURTHER ORDERED, that the Bell Operating Companies SHALL FILE CEI plans for the provision of payphone service not later than 90 days following publication of a summary of this Report and Order in the Federal Register.

373. IT IS FURTHER ORDERED, that the waivers of Section 64.1301 of the Commission's Rules granted to AT&T and Sprint in the proceedings referenced in para. 119 above ARE REVOKED, effective 30 days after publication of a summary of this Report and Order in the Federal Register.

374. IT IS FURTHER ORDERED, that the proceedings initiated by our Memorandum Opinion and Order on Further Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket 91-35, Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, 10 FCC Rcd. 11457 (1995), ARE TERMINATED.

375. IT IS FURTHER ORDERED, that the July 18, 1988 Petition of the Public Telephone Council for a declaratory ruling that BOC Payphones should be treated as CPE IS DISMISSED AS MOOT.

376. IT IS FURTHER ORDERED, that the August 7, 1995 Petition of Oncor Communications, Inc. Requesting Compensation for Competitive Payphone Premises Owners and Presubscribed Operator Services Providers IS DENIED.

377. IT IS FURTHER ORDERED, that the proceedings entitled Amendment of Section 69.2(m) and (ee) of the Commission's Rules to Include Independent Public Payphones Within the "Public Telephone" Exemption from End User Common Line Access Charges, RM 8723, ARE TERMINATED.

378. IT IS FURTHER ORDERED, that the December 28, 1989 Petition of the California Payphone Association IS DISMISSED AS MOOT.

379 IT IS FURTHER ORDERED, that the provisions set forth in Section 1.4 of the Commission's rules

establishing the date of public notice for this Report and Order ARE WAIVED, and petitions for reconsideration SHALL BE FILED within 30 days of release of this document, and oppositions to the petitions must be filed within seven (7) days after the date for filing the petitions for reconsideration. For purposes of this proceeding, Section 1.106(h) of the Commission's Rules IS WAIVED, and the Commission will not accept replies to oppositions.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| IN THE MATTER OF | ) |
| | ) |
| IMPLEMENTATION OF THE | ) |
| PAY TELEPHONE RECLASSIFICATION | ) |
| AND COMPENSATION PROVISIONS OF THE | ) |
| TELECOMMUNICATIONS ACT OF 1996 | ) |

CC DOCKET NO. 96-128

**ORDER**

Adopted: October 7, 1997
Released: October 7, 1997

By the Acting Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. In the *Payphone Orders*, the Commission imposed a requirement that, by October 7, 1997, local exchange carriers (LECs) provide payphone-specific coding digits to payphone service providers (PSPs), and that PSPs provide those digits from their payphones to interexchange carriers (IXCs). The provision of coding digits is a prerequisite to payphone per-call compensation payments by IXCs to PSPs for subscriber 800 and access code calls.

2. In this order we grant, on our own motion, pursuant to Section 1.3 of our rules, a limited waiver of five months, until March 9, 1998, to those LECs and PSPs that cannot provide payphone-specific digits as required by the Payphone Orders. This limited waiver applies to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXCs for subscriber 800 and access code calls. This limited waiver is provided to afford LECs, IXCs, and PSPs an extended transition period for the provision of payphone-specific coding digits without further delaying the payment of per-call compensation as required by Section 276 of the Communications Act. This limited waiver is effective immediately in order to ensure that PSPs receive per-call compensation beginning October 7, 1997.

## II. BACKGROUND

3. A toll-free call transmitted by a LEC to an IXC carries with it billing information codes, called automatic number identification ("ANI"), supplied by the LEC that assist the IXC in properly billing the call. Currently, however, not all payphone calls carry the payphone-specific coding digits necessary to identify the calls as payphone calls, making per-call tracking and blocking more difficult.

4. In the *Payphone Orders*, we imposed a requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide those digits from their

payphones before the PSPs can receive per-call compensation from IXCs for subscriber 800 and access code calls. In the Order on Reconsideration, we clarified that, to be eligible for per-call compensation beginning October 7, 1997, payphones are required to transmit specific payphone coding digits as a part of their ANI, which will assist in identifying payphones to compensation payers. Each payphone must transmit coding digits that specifically identify it as a payphone, and not merely as a restricted line. We also clarified that by October 7, 1997, LECs must make available to PSPs, on a tariffed basis, such coding digits as a part of the ANI for each payphone.

5. We have received three requests for a waiver of the payphone-specific coding digit requirements. On September 30, 1997, United States Telephone Association (USTA) petitioned the Commission for a waiver of the requirement that LECs supply the requisite coding digits to PSPs by October 7, 1997. USTA states that "outstanding issues involving per-call tracking and payphone coding . . . cannot be resolved before the October 7 implementation date." USTA requests that LECs with digital, equal-access switches be given an additional nine months to provide the technology required to supply and accommodate the coding digits; that LECs with non-equal-access switches be exempt from providing payphone identification information until their switches are replaced or upgraded for equal-access; and that LECs be permitted to use whatever technology they select for digital, equal-access switches to provide information that will permit IXCs to track payphone calls in order to compensate PSPs.

6. On September 30, 1997, the LEC ANI Coalition requested that the Commission waive the October 7, 1997 deadline, stating that LECs will be unable to supply forty percent of payphone lines with the requisite coding digits by that date. The Coalition indicates, however, that Ameritech, Bell Atlantic (South), BellSouth, Pacific Bell, Nevada Bell, and Southwestern Bell would commit to make payphone-specific coding digits ubiquitously available through FLEX ANI. The Coalition requested that the deadline be extended until the Commission issues an order clarifying the LECs' payphone-specific coding requirements.

7. Finally, on October 1, 1997, TDS Communications Corporation, an owner of local exchange carriers, petitioned the Commission to extend the deadline for payphone coding digits from October 7, 1997, until July 1, 1998. TDS states that, in an effort to fulfill its obligations under the Payphone Orders, it needs additional time to arrange agreements with database suppliers, and to complete transmission tests to IXCs selected by its subsidiaries.

## III. DISCUSSION

8. We will place the three petitions or requests on public notice for comment. Meanwhile, we will grant, on our own motion, pursuant to Section 1.3 of our rules, a limited waiver, until March 9, 1998, of the payphone-specific coding requirement for those LECs and PSPs not yet able to provide transmission of such digits. Those LECs and

PSPs that are able to transmit the required coding digits by October 7, 1997, remain obligated to do so. Similarly, the remaining LECs and PSPs are obligated to transmit the required coding digits as soon as they are technically capable, but in any event no later than March 9, 1998.

9. During the period between October 7, 1997, and March 9, 1998, payphones appearing on the LEC-provided lists of payphones will be eligible for per-call compensation even if they do not transmit payphone-specific codes. This waiver of the requirements applicable to LECs and PSPs will provide LECs, IXCs, and PSPs with additional time that the record indicates is necessary to implement the procedures needed to transmit payphone-specific coding digits, without further delaying the payment of per-call compensation required by section 276 of the Act.

10. Waiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. We grant this waiver to address the special circumstance that transmission of payphone-specific coding digits is not yet ready for implementation for certain phones. The industry is, however, working on an expeditious resolution of this situation. The parties have submitted extensive correspondence showing that substantial efforts are being made to arrive at an industry-wide resolution of this matter. The efforts to date indicate that the industry is working collaboratively in good faith toward the goal of enabling all payphones to transmit coding digits.

11. Waiver of this rule will serve the public interest because it will allow us to move forward in implementing the statutory requirement that PSPs receive fair compensation for calls placed from their phones. Refusal to waive this requirement would lead to the inequitable result that many payphone providers -- particularly independent providers who do not control the network modifications necessary to permit payphone-specific coding digits to be transmitted -- would be denied any compensation while implementation issues are being resolved by the industry.

12. This limited waiver, moreover, will not significantly harm any parties. The unavailability of these coding digits, for instance, will not preclude IXCs from identifying payphone calls for the purpose of determining the number of calls for which compensation is owed. Nor will the waiver interfere with the possibly sixty percent of payphones that currently are able to transmit payphone-specific coding digits. We note, also, that the Coalition states that its members are in the process of transitioning to a system that will provide the appropriate coding digits to the IXCs. We grant this waiver based on the progress made to date, and we are expecting that the Coalition's members will fulfill this commitment.

13. The waiver will, we recognize, require IXCs to pay compensation for certain calls without the ability to block those calls on a real-time basis. We find that it is nonetheless in the public interest to grant the waiver because the mandate of Section 276 is that the Commission adopt

rules that provide PSPs with per-call compensation, and the waiver will most expeditiously lead to this result. In light of this mandate, we conclude that the potential harm from the absence of compensation to PSPs would be greater than the potential harm to IXCs from the inability to block certain payphone calls before March 9, 1998.

14. We emphasize, however, the importance of implementing payphone-specific coding digit transmission as quickly as reasonably possible. We believe that it is important to require the industry to make substantial efforts to implement these requirements as quickly as possible. The time period chosen reasonably balances the interests of all concerned parties.

15. We also include LECs that have non-equal-access switches in the general coverage of this waiver. We do not address in this order the special problems presented by non-equal-access switches that were raised in the USTA Petition. We will be addressing in a separate order the issues raised by parties regarding the provision of payphone-specific coding digits by non-equal-access switches.

16. This waiver is effective immediately in order to ensure that all PSPs receive per-call compensation effective October 7, 1997, as required by the Payphones Orders. Without this waiver, many PSPs will not receive per-call compensation, because the LECs servicing them are not yet able to provide the required payphone-specific coding digits. As discussed above, LECs have argued that they have encountered problems implementing this

requirement on a comprehensive basis. The immediate implementation of this waiver is crucial to the Commission's efforts to ensure fair compensation for all PSPs, encourage the deployment of payphones, and enhance competition among payphone providers, as mandated by Section 276 of the Act.

## IV. CONCLUSION

17. Effective immediately, we grant, on our own motion, a limited waiver, until March 9, 1998, for those payphones that cannot provide payphone-specific digits as required by the Payphone Orders. This limited waiver applies to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they may receive per-call compensation from IXCs for subscriber 800, access code, 0+ and inmate calls.

## V. ORDERING CLAUSES

18. Accordingly, pursuant to authority contained in Sections 1, 4, 201-205, 218, 226, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 226, and 276, and Sections 0.91, 0.291 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 1.3, IT IS ORDERED on the Commission's own motion that the time before payphone-specific coding digits are required for per-call compensation is extended until March 9, 1998, to the extent described herein.

19. IT IS FURTHER ORDERED that this order is effective upon release thereof, and that the waiver included in this order is effective October 7, 1997.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common
Carrier Bureau

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| IN THE MATTER OF | ) |
| | ) |
| IMPLEMENTATION OF THE | ) |
| PAY TELEPHONE RECLASSIFICATION | ) |
| AND COMPENSATION PROVISIONS OF THE | ) |
| TELECOMMUNICATIONS ACT OF 1996 | ) |
| | |
| CC DOCKET NO. 96-128 | |
| | |
| TDS TELECOMMUNICATIONS CORPORATION | ) |
| PETITION FOR WAIVER OF | ) |
| CODING DIGIT REQUIREMENT | ) |
| | ) |
| INTERNATIONAL TELECARD ASSOCIATION PETITION | ) |
| FOR RECONSIDERATION OF PAYPHONE | ) |
| COMPENSATION OBLIGATION | ) |
| | |
| AIRTOUCH PAGING PETITION FOR WAIVER | ) |
| OF PAYPHONE COMPENSATION OBLIGATION | ) |

BY THE CHIEF, COMMON CARRIER BUREAU:

## MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1998
Released: March 9, 1998

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## I. INTRODUCTION

1. In this order we clarify and waive certain requirements established in the Payphone Orders regarding payphone-specific coding digits in order to facilitate the transition for local exchange carriers ("LECs"), payphone service providers ("PSPs") and interexchange carriers ("IXCs") to provide and receive payphone-specific coding digits to identify calls from payphones to pay payphone compensation for subscriber 800 and access code calls. We conclude that the waivers we grant in this order to ensure the orderly transition for the requirements we established in the Payphone Orders to implement Section 276 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"), are in the public interest. We find that the waivers we grant herein

reflect the transitional "default per-call rate" period established by the Commission in the Payphone Orders and extended in the Second Report and Order. We note that almost 80% of payphones are expected to provide payphone-specific coding digits by March 9, 1998, and the number of payphone digits for which payphone-specific coding digits are available will continue to increase over the next few months as technical problems are overcome by LECs.

2. Accordingly, in this order, we clarify the requirements established in the Payphone Orders for the provision of payphone-specific coding digits by LECs and PSPs, to IXCs beginning October 7, 1997. We clarify that automatic number information indicators ("ANI ii") and flexible automatic numbering identification ("FLEX ANI") are the methods to provide payphone-specific coding digits that comply with the requirements of the Payphone Orders. We also clarify the requirement for federal tariffs that LECs must file pursuant to the Payphone Orders. LEC FLEX ANI tariff revisions to provide FLEX ANI to IXCs must be filed no later than March 31, 1998, with a scheduled effective date of April 15, 1998, if a LEC is able to provide FLEX ANI to 25% or more of the smart payphones in its service area. Thereafter, within the waiver period granted in this order, a LEC must file its FLEX ANI tariff to provide FLEX ANI to IXCs no later than when it is able to provide FLEX ANI to 25% or more of the smart payphones in its service area. After filing the FLEX ANI tariff, LECs will continue to make FLEX ANI available as each end office becomes FLEX ANI capable. LEC tariffs to recover the costs of implementing FLEX ANI from PSPs must be filed no later

than 30 days after full implementation of FLEX ANI. In this order we also grant permissions and waivers under Part 69 of the Commission's rules so that LECs can establish rate elements to recover the costs of implementing FLEX ANI to provide payphone-specific coding digits for per-call compensation.

3. We affirm our grant in the *Bureau Waiver Order*, on our own motion, of a limited waiver of five months, until March 9, 1998, to those LECs and PSPs who assert that they cannot provide payphone-specific coding digits as required by the Payphone Orders. We also grant, to the extent described herein, the requests of USTA, TDS, and the LEC Coalition. In addition, we grant limited waivers, subject to certain procedures, for LECs unable to provide payphone-specific coding digits through FLEX ANI by March 9, 1998, because fully implementing FLEX ANI would require additional time, or because implementing FLEX ANI is either technically infeasible or would result in a midsize or small LEC being unable to recover its costs for implementing FLEX ANI for payphone compensation within a reasonable period. The waivers we grant to LECs and PSPs in this order also apply to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXCs for subscriber 800 and access code calls. Those LECs and PSPs that are able to transmit the required coding digits by March 9, 1998, remain obligated to do so. Similarly, all LECs and PSPs are obligated to transmit the required coding digits as soon an they are technically capable, but in any event, no later than

the end of the waiver period for which they are eligible pursuant to this order.

4. During the period of the *Bureau Waiver Order* and the waivers granted herein, the IXC obligation to pay per-call compensation established in the *Payphone Orders* remains in effect. Neither the *Bureau Waiver Order*, nor this order, waives the per-call compensation requirements of the *Payphone Orders* and the Second Report and Order. As required in the *Bureau Waiver Order*, payphones appearing on the LEC-provided lists of payphones are eligible for per-call compensation even if they do not transmit payphone-specific coding digits. As required in the *Payphone Orders* and the Second Report and Order, absent a negotiated agreement, IXCs must pay per-call compensation of $0.284, for all calls they receive from payphones not otherwise compensated. Payments must be remitted at least on a quarterly basis. The payment for the October 1997 through December 31, 1997 period must be paid no later than April 1, 1998. LECs that have certified to the IXC that they comply with the requirements of the *Payphone Orders* must receive per-call compensation. There are no state or federal certification requirements. Additionally, we recognize that there likely will be some disputes between IXCs and PSPs about the true number of compensable calls. These disputes should not be a basis for delay of payphone compensation payments. Because LECs and IXCs have identified problems in transmitting and receiving payphone-specific coding digits, a retroactive adjustment (true-up) of payphone compensation may be necessary for the waiver periods granted in the *Bureau*

*Waiver Order* and this order. We will address true-up requirements for payphone compensation, if any, in a subsequent order in this proceeding. In addition, we do not address in this order AT&T's request, in response to the *Bureau Waiver Order*, that it and similarly situated IXCs receive a waiver to pay per-phone rather than per-call compensation for payphones that do not provide payphone-specific coding digits. We will address AT&T's request in a subsequent order. Although we intend to issue this order in the near future, the timing of this order in no way relieves or delays the obligation of IXCs to pay compensation on April 1, 1998.

5. The waivers granted herein are effective immediately in order to ensure that all PSPs continue to receive per-call compensation, as required by the *Payphone Orders*. Without these waivers, many PSPs would not receive per-call compensation, because the LECs servicing them are not yet able to provide the required payphone-specific coding digits. The immediate implementation of this waiver is crucial to the Commission's efforts to ensure fair compensation for all PSPs, encourage the deployment of payphones, and enhance competition among payphone providers, as mandated by Section 276.

6. In addition, we deny the petition for reconsideration of the *Bureau Waiver Order* filed by International Telecard Association ("ITA") and the petition for waiver of compensation obligations filed by AirTouch Paging ("AirTouch").

* * *

## VI. REQUESTS FOR WAIVER OF PAYPHONE COMPENSATION REQUIREMENTS

### A. Introduction

83. The *Bureau Waiver Order* granted limited waivers to afford LECs, IXCs, and PSPs an extended transition period for the provision of payphone-specific coding digits without further delaying the payment of per-call compensation as required by Section 276 of the Communications Act. These limited waivers apply to the requirement that LECs provide payphone-specific coding digits to PSPs, and that PSPs provide coding digits from their payphones before they can receive per-call compensation from IXCs for subscriber 800 and access code calls.

84. On November 6, 1997, ITA filed a petition for partial reconsideration of the *Bureau Waiver Order*. ITA requests that the Commission preclude PSPs from assessing per-call compensation payment obligations on prepaid phone card services for the duration of the waiver, and until accurate coding digit information is provided. ITA claims that providers of prepaid cards will be irreparably harmed without the ability to track and block payphone calls in real time, because this is the only time a prepaid provider can recover a charge from its customer.

85. On December 15, 1997, AirTouch filed a petition for a limited waiver of its payment obligations to pay any payphone service providers (PSPs) on a per-call basis from October 7, 1997, until those PSPs provide payphone-specific coding digits allowing AirTouch to selectively block calls from payphones operated by that PSP. AirTouch claims that because of the Bureau Waiver Order and other circumstances, AirTouch will not receive coding digits and will not be able to block calls coming specifically from payphones. AirTouch states that it will suffer substantial harm if it must pay compensation on a per-call basis without the ability to block calls selectively, because PSPs will have no incentive to negotiate rates and AirTouch's liability will be unlimited for calls from payphones.

B. Discussion

86. Subsequent to the *Bureau Waiver Order*, IXCs and other parties argued in pleadings in response to that order that they should be relieved of the payphone compensation obligation because LECs were not providing payphone-specific coding digits. For the reasons discussed below, we decline to relieve IXCs of the obligation to pay per-call compensation during the waiver period of the *Bureau Waiver Order* and the additional waivers we grant herein. The *Payphone Orders* concluded that the primary economic beneficiaries of a subscriber 800 and access code call are the carriers that carry the call. We are not persuaded that our waivers of the provision of payphone-specific coding digits revises the Commission's conclusion. Nor do

the waivers preclude IXCs from identifying and paying payphone compensation. The *Bureau Waiver Order* required that IXCs pay per-call compensation during the coding digit waiver period as required by the *Payphone Orders*. During that period, IXCs and their customers continued to use payphones to make calls that must be compensated pursuant to the *Payphone Orders* and the Second Report and Order. Moreover, IXCs already have implemented surcharges for per-call compensation and they would be benefiting unreasonably if we were to grant them a waiver of the payphone compensation obligations so that they do not have to pay per-call compensation when payphone-specific coding digits are not available. The *Bureau Waiver Order* waived the requirement that LECs and PSPs provide payphone-specific coding digits as a precondition to per-call compensation. The *Bureau Waiver Order* did not waive any compensation requirements. For the reasons discussed herein, we similarly decline to provide such a waiver or reconsider our decision in the Bureau Waiver Order to waive the coding digit requirement while continuing to require the payphone compensation obligations.

87. Several IXCs and other parties argue that they should be relieved of payphone compensation obligations because: (1) LECs were aware of the clear language and requirements specified in the *Payphone Orders* that payphone-specific coding digits must be provided by October 7, 1997, so they should not be absolved of the requirement and should be legally liable for any compensation lost by PSPs due to their inability to comply;

(2) the payment obligation should have been waived for IXCs and other payors; and (3) IXCs and other payors should not have to pay compensation because they are unable to block calls from payphones and must therefore pay compensation they could otherwise avoid if payphone-specific coding digits were available. For the reasons discussed above, we conclude that LECs are entitled to waivers to complete implementation of FLEX ANI. In addition, we reject the argument that LECs that are unable to provide FLEX ANI on October 7, 1997, during the waiver period in the *Bureau Waiver Order* or for the duration of the waivers granted in this order, should be responsible for the payphone compensation due from IXCs to PSPs. We conclude that the need for these waivers does not alter the conclusions in the Payphone Orders that the IXCs are the economic beneficiary of subscriber 800 and access code calls and should be the party to pay payphone compensation in light of the Congressional mandate in Section 276.

88. We deny ITA's petition for reconsideration of the obligation to pay compensation during the waiver period, and AirTouch's petition for waiver seeking similar relief, both of which were filed in response to the *Bureau Waiver Order*. We also deny the requests of ITA and AirTouch that they be granted relief from the payment obligations of the *Payphone Order* and the Second Report and Order until they can block calls. Although AirTouch and ITA use different administrative mechanisms, they both argue that they should be relieved of the payphone compensation obligations because they will be harmed if they are unable to identify and block payphone calls while the waiver of the

payphone-specific coding digit requirement is in effect, or until they can block calls. ITA argues that the Commission should deny in part the requested LEC waivers because granting them would result in harm to prepaid card providers. ITA requests a waiver of payphone compensation until "accurate" payphone-specific coding digits are provided. ITA claims that it will incur $31.8 million in unrecoverable charges on prepaid cards. ITA asserts that prepaid providers cannot recover payphone charges from customers unless payphone calls can be identified/blocked in real-time; otherwise, they will be irreparably harmed. ITA contends that because prepaid card service providers have postalized rates and are paid in advance, the only way to recover a payphone charge is at the time a payphone-originated call is placed.

89. ITA and AirTouch argue that relieving the LECs and PSPs of the obligation to provide payphone-specific coding digits while requiring payors to continue payment obligations undermines the market-based approach used to establish the per-call default compensation rate. AirTouch seeks a waiver until it can selectively block calls. AirTouch argues that it could be obligated to pay as much a $1 million in compensation for calls it is unable to block because the calls do not provide payphone-specific coding digits. AirTouch asserts that it is entitled to the waiver because it detrimentally relied on the fact that coding digits would be available to block payphone calls. AirTouch argues that it should be provided with a waiver because unlike other paging companies, such ,as Paging Network and Metrocall who do not plan to block calls from payphones, it

offers call blocking, which enables customers to avoid additional charges. Because it is unable to block 40 percent of the payphone calls, it states that it will be obligated for that compensation. Several parties support AirTouch's petition for waiver and ITA's request for reconsideration and request that they also be exempted from the payphone obligations established in the *Payphone Orders* and the Second Report and Order. On the other hand, APCC and the LEC Coalition argue that the Commission should deny both petitions because AirTouch and ITA are not underlying facilities-based carriers obligated to pay per-call compensation, the default rate established in the payphone orders does not depend on the ability to block payphone calls, and it would not be in the public interest for the Commission to grant these petitions because delaying payphone compensation would be contrary to Congressional intent. The LEC Coalition argues that IXCs have already increased subscriber 800 rates, increased per-call charges on customers, and gained from reductions in state and federal access charges.

90. We conclude that AirTouch has not shown special circumstances or that a waiver is in the public interest. We also decline to reconsider, in response to ITA's Petition, our decision in the *Bureau Waiver Order* to waive payphone-specific coding digit requirements while maintaining, and not waiving, the per-call compensation requirements during the waiver period. We note that carriers have known since the adoption of the 1996 Act, in February 1996, that Congress required in Section 276 that PSPs be compensated for "each and every call." Moreover, on

September 20, 1996, parties were notified that the per-call default compensation rate in the first year of per-call compensation, the default rate adopted because the payphone market would require a period of transition, would be $0.35 per-call. Despite the court decision vacating, in part, the *Payphone Orders* in July 1997, and the adoption of the new default compensation rate of $0.284 in October 1997, parties have been on notice that they must pay per-call compensation. In creating the default rate in the *Payphone Orders* and the Second Report and Order, we also put carriers on notice that there may be transitional problems in moving to a totally unregulated per-call rate.

91. In the *Payphone Orders*, the Commission established a requirement that underlying facilities-based interexchange carriers pay per-call compensation. We concluded in the Report and Order that the "carrier-pays" system for per-call compensation places the payment obligation on the primary economic beneficiary in the least burdensome, most cost effective manner. In addition, under the carrier-pays system, individual carriers, while obligated to pay a specified per-call rate to PSPs, have the option of recovering a different amount from their customers, including no amount at all. We noted in the Report and Order, however, that under the carrier-pays approach, carriers have "the most flexibility to recover their own costs, whether through increased rates to all or particular customers, through direct charges to access code call or subscriber 800 customers, or through contractual agreements with individual customers." As discussed below, the Commission adopted a per-call default rate that provides fair

compensation to PSPs for the use of payphones to originate access code and subscriber 800 calls. Per-call compensation to PSPs is a cost of providing service that IXCs can pass on to their own customers, just as they pass on other costs.

92. In *Illinois Public Telecomm.*, the court remanded the per-call default compensation issue to the Commission on the ground that the Commission had not justified its conclusion that the costs of local coin calls were similar to those of subscriber 800 and access code calls. The court did not hold, however, that the Commission erred in using a market-based rate because some carriers lack the ability to block calls. Although the court noted that call blocking technology was available, and acknowledged that the ability to block calls gave IXCs leverage in negotiating rates, the court held that the per-call default rate adopted by the Commission should be reasonably justified so that IXCs are "not forced to resort to call blocking only because the default rate has been set at an unreasonable level." On remand, the Commission obtained further data on cost differences, and explained fully the cost adjustments to the local coin rate, which justified a reduction in the per-call compensation for subscriber 800 and access code calls, absent a negotiated agreement, from $0.35 to $0.284. The Commission considered alternatives to the market-based approach to establish a default rate, but rejected them as not required either by the court's remand or by the statutory standards. The Commission also concluded that the proposed alternatives were inferior to its chosen approach. The Commission's actions are consistent with the agency's

statutory mandate to ensure fair compensation for "each and every" call.

93. We cannot at this late date find that certain parties, although they have continued to use payphones to make subscriber 800 and access code calls, which PSPs cannot block because of statutory limitations, may be relieved of the statutory requirement that there be compensation for these calls as required by Section 276. As the Commission already stated "because Section 276 creates no exceptions for calls facilitated by reseller or debit card providers, such exemptions from the obligation to pay compensation, even on an interim basis, would be contrary to the congressional mandate that we ensure fair compensation for 'each and every completed intrastate and interstate call.'"

94. We decline to grant a waiver to ITA and AirTouch of the payphone compensation requirements of the *Payphone Orders* because they are unable to block payphone calls, nor do we find that the inability to block payphone calls undermines the market-based approach for payphone compensation. In the Second Report and Order the Commission established a default rate for per-call compensation and extended the period for default compensation for to years while acknowledging that it was granting the limited waiver for the provision of payphone-specific coding digits. In that order, the Commission addressed concerns, among other things, that there may be market imperfections in the negotiation process among IXCs, LECs, and PSPs with regard to the transition to unregulated market-based per-call compensation. The

Commission stated that it "recognized that competitive conditions, which are a prerequisite to a deregulatory market-based approach, did not exist yet, and would not be achieved instantaneously." The Commission indicated that over time the market-based approach would not overcompensate PSPs because carriers have significant leverage, including the ability to block calls, and to negotiate for lower rates. The establishment of a default compensation rate was itself intended, in part, to compensate for any unequal bargaining power arising out of the inability of carriers to block payphone calls. Additionally, recognizing problems that some carriers are having in providing payphone-specific coding digits and concerns due to potential unequal bargaining power, the Commission extended the one year per-call default rate time period established in the *Payphone Orders* to two years in the Second Report and Order. Moreover, in the Payphone Orders the Commission required that LECs and PSPs provide payphone-specific coding digits to "assist in identifying them to compensation payors," not because they also can be used for blocking calls from payphones during the interim period while the default per-call rate is in effect.

95. In the Second Report and Order, the Commission stated that it established a default per-call rate "because certain call blocking capabilities are not yet available to participants in the provision of access code and subscriber 800 calls from a payphone, and thus the market is not yet free of impediments that interfere with the competitive negotiated process." Thus, the establishment of a default per-call compensation rate was itself intended to

address the possibility of unequal bargaining power between PSPs and carriers. In the Payphone Orders, the Commission concluded that, once competitive market conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones. It is only in cases where the market does not or cannot function properly that the Commission needs to take affirmative steps to ensure fair compensation. For example, because TOCSIA requires all payphones to unblock access to OSPs through the use of access codes (including 800 access numbers), PSPs cannot block access to 800 numbers generally. TOCSIA does not, however, prohibit an IXC from blocking subscriber 800 numbers from payphones, particularly if the IXC wants to avoid paying the per-call compensation charge on these calls. Payphones that are not capable of transmitting payphone-specific coding digits must maintain the default rate established in the Second Report and Order for the waiver period until FLEX ANI coding digits are available.

96. In addition, the waiver of the payphone-specific coding digits requirements is limited. The *Bureau Waiver Order* stated that at most 40 percent of the payphones were affected by the waiver. As of March 9, 1998, the payphones not receiving payphone-specific coding digits will be reduced to almost 20 percent. Moreover, as discussed above, pursuant to the waiver, LECs and PSPs that are capable of transmitting coding digits are obligated to do so. AirTouch and ITA argue that they are unable to block certain calls for which its customers must pay compensation. As discussed above, however, due to statutory constraints,

LECs and PSPs are unable to block the use of their payphones by their customers, and absent a negotiated agreement, the PSPs would not receive compensation without the requirements of the *Payphone Orders* and the Second Report and Order. We concluded in the Bureau Waiver Order that, on balance, the public interest warranted granting the waiver. We similarly conclude here that the equities under the circumstances and the goals of Section 276 make it clear that the substantive grounds in support of the ITA and AirTouch petitions do not justify a delay in per-call compensation for subscriber 800 and access code calls.

97. The waivers granted in the *Bureau Waiver Order* and this order to the LECs and PSPs will, we recognize, require AirTouch, ITA and IXCs to pay compensation for certain calls without the ability to block those calls on a real-time basis. We find that it is nonetheless in the public interest to grant the waiver because the mandate of Section 276 is that the Commission adopt rules that provide PSPs with per-call compensation, and the waiver will most expeditiously lead to this result. In light of this mandate, we conclude that the potential harm from the absence of compensation to PSPs would be greater than the potential harm to AirTouch, ITA, IXCs, and other payors from the inability to block certain payphone calls.

98. We conclude consistent with our decisions in the MCI Order and the PCIA Order, that delaying per-call compensation for AirTouch and ITA would be harmful to other parties and adverse to the public interest because it would deprive PSPs of compensation for subscriber 800 and

access code calls. IXCs that provide interexchange service to payors such as AirTouch and ITA already have been relieved of part of their burden of paying carrier common line access charges to LECs insofar as those charges previously subsidized LEC payphone operations. Additionally, IXCs already have increased interstate rates and implemented per-call charges for payphone compensation. Moreover, considering the access charge reduction, delaying per-call compensation requirements, in addition to the access charge reduction, would aggravate the immediate revenue loss to LEC providers of payphone services. Thus, balancing the equities, the public interest is best served by the immediate implementation of the Commission's compensation rules. Congress specifically provided for setting an expedited deadline for Commission action. In the long term, of course, depriving PSPs of fair compensation would discourage them from deploying their payphones widely, which would be inconsistent with an express congressional purpose.

## VII. CONCLUSION

99. In this order, we clarify that LECs must implement FLEX ANI to transmit payphone-specific coding digits that are not already provided as part of ANI ii. We grant waivers to LECs, PSPs, and IXCs and conclude that the waivers are in the public interest to facilitate the transition to per-call compensation. We find that special circumstances with regard to the provision of FLEX ANI and the identification of calls coming from payphones justify these waivers. We conclude that the waivers we grant in this

order are necessary to facilitate the identification of calls coming from payphones in order for IXCs to pay payphone compensation consistent with Section 276 and are in the public interest.

## VIII. ORDERING CLAUSES

100. Accordingly, pursuant to authority contained in Sections 1, 4, 201-205, 218, 226, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 226, and 276, that the policies and requirements set forth herein ARE ADOPTED.

101. IT IS FURTHER ORDERED that this Order is effective immediately upon release thereof, and that the waivers included in this order are effective March 9, 1998.

102. IT IS FURTHER ORDERED that pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, each of the LECs, absent a waiver, SHALL FILE tariff revisions to their interstate access tariffs to reflect the availability of FLEX ANI for IXCs for the purpose of payphone compensation no later than March 31, 1998, with a scheduled effective date of April 15, 1998, if FLEX ANI is available for 25% or more of the smart payphones in its service area. Thereafter, within the waiver period it is granted in this order, a LEC must file its tariff revision to provide FLEX ANI to IXCs no later than when it provides FLEX ANI to 25% or more of the smart payphones in its service area.

103. IT IS FURTHER ORDERED that pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, each of the LECs providing FLEX ANI SHALL FILE tariffs to recover the cost of implementing FLEX ANI as required herein no later than 30 days after full implementation of FLEX ANI.

104. IT IS FURTHER ORDERED that LECs are granted a waiver of Part 69 of the Commission's rules to develop a rate element for recovery of costs incurred to implement FLEX ANI from PSPs for the requirements of this order to provide FLEX ANI to IXCs.

105. IT IS FURTHER ORDERED that the ITA Petition for Reconsideration and the AirTouch Petition for Waiver of the Bureau Waiver Order ARE DENIED.

106. IT IS FURTHER ORDERED that the waiver requests of USTA, the LEC Coalition, and TDS ARE GRANTED to the extent described herein, and otherwise ARE DENIED.

A. Richard Metzger, Jr.
Chief, Common Carrier
Bureau

166 F.3d 387

INTERNATIONAL TELECARD ASSOCIATION and WorldCom, Incorporated,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 98-1291.

United States Court of Appeals,
District of Columbia Circuit.

Feb. 23, 1999.

Before: GINSBURG, SENTELLE, and ROGERS, Circuit Judges.

Opinion for the court filed PER CURIAM.

PER CURIAM:

In *Richman Bros. Records, Inc., v. Federal Communications Commission*, 124 F.3d 1302 (D.C.Cir.1997), we dismissed a petition for review because the petitioners had not yet sought review of the agency order by the full Federal Communications Commission, as

required by 47 U.S.C. § 155(c)(7). The question presented in this case is whether judicial review can be obtained when Commission review has been sought, but not yet obtained. In other words, is the act of filing a request for Commission review in itself sufficient to satisfy the judicial review prerequisites of § 155(c)(7). We hold that it is not.

The order under review in this petition was issued March 9, 1998, by the Chief of the FCC's Common Carrier Bureau, Implementation of the Payphone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order No. DA 98-481, 13 FCC Rcd. 4998 (Com. Car. Bur.1998). The order was issued pursuant to authority delegated by the full Commission to the Common Carrier Bureau Chief. See 47 U.S.C. § 155(c)(1); 47 C.F.R. §§ 0.91 & 0.291. In April 1998, petitioners filed an application for full Commission review of the March 9 order, pursuant to 47 U.S.C. § 155(c)(1) (orders issued on authority delegated by the Commission "may be adopted, amended, or rescinded only by a vote of the majority of the members of the Commission then holding office"). Petitioners filed a petition for judicial review in June 1998. The FCC moved to dismiss for lack of jurisdiction because the full Commission had not yet resolved the application for administrative review. In an unpublished order filed September 15, 1998, we granted the FCC's motion and dismissed the petition for review.

Petitioner International Telecard Association (ITA) filed a petition for rehearing arguing that the act of filing an application for Commission review satisfies the statutory

prerequisite to judicial review, and that petitioners need not await the Commission's decision *388 on review before petitioning this court. ITA's argument is based on the language of 47 U.S.C. § 155(c)(7), which provides that "[t]he filing of an application for review [by the full Commission] shall be a condition precedent to judicial review of any order taken pursuant to" delegated authority, but does not explicitly require a petitioner to await the Commission's disposition.

ITA's reading of § 155(c)(7), however, conflicts with the reasoning of *Richman Bros.* The petition at issue in *Richman Bros.* arose out of a primary jurisdiction referral from a district court to the FCC's Common Carrier Bureau. We disallowed Richman's attempt to obtain judicial review of the resulting staff decision without first seeking Commission review. *Richman Bros.* rejected the claim that § 155(c)(7)'s "exhaustion requirement" is inapplicable to primary jurisdiction referrals, reasoning that "the Congress did not intend that the court review a staff decision that has not been adopted by the Commission itself." *Id.*, 124 F.3d at 1304. The *Richman Bros.* reasoning applies equally to the situation presented here. Because ITA's interpretation of § 155(c)(7) would permit judicial review of a staff decision before the Commission has "adopted, amended, or rescinded" that decision, see § 155(c)(1), it must be rejected.

Lest there be any misunderstanding, we expressly hold that a petition for review filed after a bureau decision but before resolution by the full Commission is subject to

dismissal as incurably premature. Ongoing agency review renders an order nonfinal for purposes of judicial review, and a petition for review of the order is incurably premature. *Cf. Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1490 (D.C.Cir.1994) (while party's request for agency reconsideration remains pending, petition for judicial review incurably premature); *Wade v. FCC*, 986 F.2d 1433, 1434 (D.C.Cir.1993) ("danger of wasted judicial effort ... attends the simultaneous exercise of judicial and agency reconsideration").

Because ITA's petition for review was properly dismissed, we deny the petition for rehearing.

END OF DOCUMENT

TEXT OF 47 U.S.C. § 155

ORGANIZATION AND FUNCTIONING OF THE COMMISSION

(a) The member of the Commission designated by the President as chairman shall be the chief executive officer of the Commission. It shall be his duty to preside at all meetings and sessions of the Commission, to represent the Commission in all matters relating to legislation and legislative reports, except that any commissioner may present his own or minority views or supplemental reports, to represent the Commission in all matters requiring conferences or communications with other governmental officers, departments or agencies, and generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission. In the case of a vacancy in the office of the chairman of the Commission, or the absence or inability of the chairman to serve, the Commission may temporarily designate one of its members to act as chairman until the cause or circumstance requiring such designation shall have been eliminated or corrected.

(b) From time to time as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission's principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary. Each such integrated bureau shall include such legal, engineering, accounting, administrative, clerical, and

other personnel as the Commission may determine to be necessary to perform its functions.

(c) (1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection and except any action referred to in sections 204(a)(2), 208(b), and 405(b) of this title) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; except that in delegating review functions to employees in cases of adjudication (as defined in section 551 of Title 5), the delegation in any such case may be made only to an employee board consisting of two or more employees referred to in paragraph (8) of this subsection. Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office. Except for cases involving the authorization of service in the instructional television fixed service, or as otherwise provided in this chapter, nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in paragraph (2) or (3) of section 556(b) of Title 5, of any hearing to which such section applies.

(2) As used in this subsection the term "order, decision, report, or action" does not include an initial, tentative, or

recommended decision to which exceptions may be filed as provided in section 409(b) of this title.

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.

(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review

of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

(8) The employees to whom the Commission may delegate review functions in any case of adjudication (as defined in section 551 of Title 5) shall be qualified, by reason of their training, experience, and competence, to perform such review functions, and shall perform no duties inconsistent with such review functions. Such employees shall be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed. In the performance of such review functions such employees shall be assigned to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency.

(9) The secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

(d) Meetings of the Commission shall be held at regular intervals, not less frequently than once each calendar month,

at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission with the objective of rendering a final decision (1) within three months from the date of filing in all original application, renewal, and transfer cases in which it will not be necessary to hold a hearing, and (2) within six months from the final date of the hearing in all hearing cases.

(e) The Commission shall have a Managing Director who shall be appointed by the Chairman subject to the approval of the Commission. The Managing Director, under the supervision and direction of the Chairman, shall perform such administrative and executive functions as the Chairman shall delegate. The Managing Director shall be paid at a rate equal to the rate then payable for level V of the Executive Schedule.

TEXT OF 47 U.S.C. § 276

PROVISION OF PAYPHONE SERVICE

(a) NONDISCRIMINATION SAFEGUARDS. -- After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) REGULATIONS. --

(1) CONTENTS OF REGULATIONS. -- In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that --

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specificed in subparagraph (A);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the *Computer Inquiry-III* (CC Docket No. 90-623) proceeding;

(D) provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest; and

(E) provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones.

(2) PUBLIC INTEREST TELEPHONES.-- In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(3) EXISTING CONTRACTS.-- Nothing in this section shall affect eny existing contracts between location providers and payphone service providers or interLATA or intraLATA carriers that are in force and effect as of the date of enactment of the Telecommunications Act of 1996.

(c) STATE PREEMPTION.-- To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

(d) DEFINITION.-- As used in this section, the term "payphone service" means the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**
Case No. 98-1291

INTERNATIONAL TELECARD ASSOCIATION,

*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION

and UNITED STATES OF AMERICA,

*Respondents.*

**PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC***

Pursuant to Fed. R. App. P. 40 and Circuit Rule 35, petitioner International Telecard Association ("ITA") respectfully requests rehearing of the Court's *per curiam* September 15, 1998 decision dismissing its Petition for Review of an order of the Federal Communications Commission ("FCC" or "Commission"). ITA also suggests the appropriateness of rehearing *en banc* in order to allow

the full Court the opportunity to address the question of first impression presented in this case regarding appellate jurisdiction under Section 5 of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(7)("the Act"). If the panel's decision is permitted to stand without correction or elaboration, this Court will have established a new and substantial administrative exhaustion requirement, applicable to a wide variety of FCC proceedings, with no discussion of the substantive legal or policy merits.

## BACKGROUND

On April 8, 1998, ITA filed an Application for Review with the FCC of the agency's March 9, 1998 Memorandum Opinion and Order[5] regarding payphone compensation rates ("Bureau Order"). ITA requested that the FCC reverse the Bureau Order on grounds that it arbitrarily waived conditions of the agency's payphone compensation rules that were central to the Court's rationale in its prior appellate decisions[6] and that discriminate against prepaid phone card providers. Receiving no response from the Commission, Petitioners ITA and WorldCom[7] filed a Petition for Review with this Court on June 26, 1998,

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[5] *Implementation of the Pay Telephone Reclassifications and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, CC Docket No. 96-128,, 13 FCC Rcd. 4998 (1998).

[6] *See MCI v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); *Illinois Pub. Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997).

[7] WorldCom is not participating in this petition for rehearing.

asserting jurisdiction under Section 402 of the Act, 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2342 and 2344.

The FCC moved to dismiss the petition on July 16, 1998, relying upon this Court's decision in *Richman Bros. v. FCC*[8] that failure to request Commission review of an order issued on so-called "delegated authority" bars appellate review under Section 5 of the Act, 47 U.S.C. § 155(c)(7). The Commission argued that this Court lacked jurisdiction because "[h]aving failed to ask the full Commission to review the matter, petitioners cannot meet that [subject matter jurisdiction] burden in this case[.]"[9] ITA had in fact filed an Application for Review,[10] which the FCC later ackowledged on reply.[11] On September 15, 1998, a panel of this Court granted the FCC's motion and dismissed the case without opinion. ITA now seeks rehearing of this decision by the full Court to reconsider the limits of federal jurisdiction over Commission orders under the Act.

## ARGUMENT

This case presents a question of first impression regarding appellate jurisdiction to review FCC orders that the agency chooses to issue on "delegated authority," but for which the Commission refuses to decide an application for

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[8] *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997).

[9] FCC Motion to Dismiss at 2 (July 16, 1998).

[10] Petitioners' Opposition to Motion to Dismiss, at 2 (July 24, 1998).

[11] FCC Reply in Support of Motion to Dismiss at 1 (July 28, 1998).

full agency review. Contrary to the assumption of the panel's *per curiam* order, this case is not controlled by *Richman Bros.*, nor does any other precedent support dismissal, because the administrative "filing" required by Section 5 was in fact made by ITA below. The plain language of Section 5 of the Act, as well as the settled policy of administrative exhaustion, is also inconsistent with the panel's decision. Accordingly, the decision fully warrants rehearing, and rehearing *en banc*, in order to decide this novel jurisdictional issue with a full Court opinion and analysis.

Section 5(c)(7) of the Act states that "the filing of an application for review . . . shall be a condition precedent to judicial review of any order decision, report or action made or taken pursuant to a delegation [of authority]." 47 U.S.C. § 155(c)(7). In compliance with this language, ITA first sought full agency review of the Bureau Order.[12] Filing this Application for Review fully comports with the plain meaning and the policy of the administrative exhaustion requirement of the Act.

Section 5 provides that the *filing* of an internal agency appeal is a condition precedent to federal appellate review of a "delegated authority" decision. Applying this express language, this Court in *Richman Bros.* held that the failure to exhaust administrative remedies by filing an application for review is jurisdictional and cannot be

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[12] A copy of this Application for Review, filed April 8, 1998, was attached to Petitioners' opposition to the FCC's motion to dismiss.

excused, even for matters (such as primary jurisdiction referrals) that do not originate with the agency. 124 F.3d at 1304. But neither *Richman* nor any other decision applies Section 5 to circumstances where an application for review has been filed but not yet decided by the agency. (Neither the FCC nor the panel cites any such cases.) Thus, as Petitioners argued on brief,

> Neither this Court nor the Supreme Court has ever held that Commission consideration of an 'application for review' must be concluded prior to seeking judicial review. Such a construction would not only contravene the plain language of Section 5(c), but also settled law on exhaustion of administrative remedies.[13]

The express language of Section 5 is dispositive. Congress is presumed to mean what it says when drafting a statute. *Moskal v. United States*, 498 U.S. 103, 108 (1990)("' In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'")(citation omitted); *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986)("The 'plain purpose' of legislation, however, is determined in the first instance with reference to the plain language of the statute itself."); *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been

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[13] Petitioners' Opp. at 2.

expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'") (citation omitted).

Settled law on exhaustion of administrative remedies requires courts to heed the strictures Congress has mandated. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)("Where Congress specifically mandates, exhaustion is required."). Congress drafted Section 5 to require specifically the *filing* of an application for review prior to judicial review, without any requirement to wait for that application's disposition. By interpreting this provision *sub silentio* to require something more than Section 5 stipulates, this Court has interposed its own policies on proper allocation of court/agency jurisdiction for those established by Congress. Yet the appropriate role of courts — in both statutory interpretation and administrative exhaustion — is to apply congressional intent, not to unilaterally set policy.

Applying the Act's plain language is, as a practical matter, entirely consistent with accepted policy underlying the exhaustion requirement. It is proper that an agency retain jurisdiction over its own matters until its expertise has been exhausted, thereby requiring aggrieved parties to defer to the agency prior to seeking relief in the judiciary. Congress "imposed the requirement in order to ensure that the full Commission had 'an opportunity to review the decision before the matter goes to the courts.'"[14] It is the filing of an application for review that gives the full FCC the

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[14] FCC Reply at 1 (*quoting* S. Report No. 576, 87th Cong., 1st Sess. at 2).

"opportunity to review" delegated staff decisions. Whether or not the agency chooses to exercise that opportunity — and either prevent or moot an appeal — is entirely a matter of administrative discretion, not judicial jurisdiction.[15]

The FCC does not really contest any of this. In its initial motion to dismiss this appeal, the Commission flatly (and incorrectly) stated that the appeal was barred because the agency had not received an application for agency review. Once this faulty premise was exposed by Petitioners, the FCC argued that the appeal should nonetheless still be dismissed, without ever explaining why Congress could have intended to make judicial review hinge on resolution of an intra-agency appeal as to which there is neither a deadline nor any obligation to decide. With an alarming lack of candor, the agency acknowledged, *only by its silence and lack of controlling citations*, that its motion actually asked this Court to make new law on the limits of appellate jurisdiction.

At the very least, the issue of first impression raised in this case deserves more than *per curiam* treatment. With this decision, the Court has created new precedent on exhaustion of administrative remedies, and a published

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[15] Applications for full Commission review routinely languish at the agency for years without decision. For instance, instead of deciding an application for agency review of staff's former payphone rules, the FCC waited two years until its new payphone rules were promulgated and then released an order dismissing the application on grounds of mootness. *Application for Review and Motion for Stay of Allnet Communications Services, Inc.*, Memorandum Opinion and Order, FCC 98-161 (rel. July 16, 1998).

opinion is therefore necessary to provide a reasoned explanation, uniformity among the courts and to guide administrative practice at the FCC. Whether or not the full Court agrees with the panel decision, this case should be reheard in order to provide the courts and practitioners with a full analysis of Section 5 jurisprudence in these new circumstances.

Respectfully submitted,

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